Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

TIFFANY D. SHAW,

Petitioner,

-versus-

AUTOZONE, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE DECISION OF A SUBORDINATE EMPLOYEE TO REFRAIN FROM REPORTING SEXUAL HARASSMENT INFLICTED UPON HER BY A SUPERVISORY EMPLOYEE DOES NOT ALWAYS AND UNDER ANY CIRCUMSTANCE CONSTITUTE AN UNREASONABLE FAILURE TO TAKE ADVANTAGE OF PREVENTIVE OR CORRECTIVE OPPORTUNITIES PROVIDED BY THE EMPLOYER

II. WHETHER THE APPELLATE COURT COULD NOT PROPERLY GRANT SUMMARY JUDGMENT ON DE NOVO REVIEW OF THE TRIAL COURT RECORD, BASED UPON THE APPLICATION OF LEGAL PRINCIPLES WHICH DID NOT EXIST AND WHICH WERE THEREFORE NOT LITIGATED WHEN THE CASE WAS BEFORE THE TRIAL COURT.

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Opinions Below

The decision of the United States Court of Appeals for the Seventh Circuit is set forth in the Appendix, p.1a and is reported at 180 F.3d 806 (7th Cir. 1999). The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois (Western Division) is unreported and dated September 19, 1997 and set forth in the Appendix, p. 16a. A timely Petition for Rehearing En Banc was filed and the same was denied on July 19, 1999, in an Order set forth in the Appendix, p. 25a.

Statement Of The Basis Of Jurisdiction Of The Supreme Court

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Seventh Circuit issued its denial of Shaw's Petition for Rehearing on July 19, 1999. This Petition was timely filed within ninety days of the panel rehearing denial, and is thus timely.

Statement Of The Case

The Plaintiff, Tiffany D. Shaw, was employed by the Defendant, AutoZone Inc., as the assistant store manager of its Rock Falls store beginning in mid-February 1995 and continuing until June 6, 1995. AutoZone is a Nevada corporation principally engaged in the retail sale of automotive parts.

Mr. Donald Noble became the store manager of AutoZone's Rock Falls store beginning in approximately May

1993 and continuing throughout the entire course of Ms. Shaw's employment by AutoZone. Mr. Noble's duties as store manager included supervision of employees, training of new workers, and creation of employee work schedules. Mr. Noble's duties also included attending managers' meetings, planning inventories, and maintaining store conditions. There was no lateral or higher employment rank than that of store manager within the Rock Falls, Illinois AutoZone store in which Ms. Shaw and Mr. Noble were simultaneously employed. Throughout the course of her employment with AutoZone, Ms. Shaw acted in the capacity of Assistant Store Manager. The position of Assistant Store Manager was at all times subordinate to that of Store Manager. As store manager, Mr. Noble was involved in decisions involving the hiring, promotion, demotion, and termination of store employees.

Prior to Ms. Shaw's employment with AutoZone, Inc., Mr. Noble initiated contact with her and requested that she submit an application for employment. Mr. Noble then reviewed Ms. Shaw's application for employment and discussed its content with an AutoZone employment recruiter, Steve Dauw. Mr. Noble also consulted and conferred with Mr. Dauw relative to the decision to hire her. Ms. Shaw was hired by AutoZone in February, 1995 and remained employed there until June 6, 1995.

During the course of Ms. Shaw's employment at AutoZone, Mr. Noble asked her several personal questions about her sex life. Mr. Noble suggested that Ms. Shaw should request that her husband use ice to enhance the quality of sexual relations. On a regular and persistent basis, Mr. Noble made several offensive sexual comments about the female body parts of Ms. Shaw and another female

employee. Mr. Noble told a store manager from a different AutoZone store that Ms. Shaw and another female employee were part of his "harem." Mr. Noble also made crude comments about his "nuts," referring to his own genitalia.

As a requirement of her employment, Ms. Shaw was on many occasions compelled by AutoZone to ride as a passenger in Mr. Noble's vehicle, with no one else present, on long road trips connected with employment. On one such trip, Mr. Noble asked his lone passenger, Ms. Shaw, if she masturbated, and he asked her what type of sexual activity she engaged in when her husband was out of town. On that same trip, Mr. Noble also told Ms. Shaw about certain of his old girlfriends who purportedly possessed suitcases of sexual toys. Mr. Noble described dirty movies to Ms. Shaw, and bragged to Ms. Shaw that he was good in bed. Ms. Shaw thereafter quit her employment with AutoZone.

The Plaintiff, Tiffany D. Shaw, filed her complaint, in the United States District Court for the Northern District of Illinois, against AutoZone, Inc., therein alleging liability based upon sexual harassment which was inflicted upon her by her supervisor, Donald Noble. AutoZone moved for summary judgment. In support of its Motion for Summary Judgment, AutoZone argued, in part, that Ms. Shaw could not prove that AutoZone's managerial officials knew or should have known of the alleged hostile work environment occasioned by the conduct of AutoZone's supervisory employee, Mr. Noble. AutoZone argued at the trial court level that it was entitled to summary judgment because Ms. Shaw was unable to prove that AutoZone had been negligent

In a Memorandum Opinion and Order issued on September 25, 1997, the United States District Court for the Northern District of Illinois, Western Division, granted

AutoZone's Motion for Summary Judgment. The lower court therein held that negligence was the appropriate standard of employer liability in sexual harassment cases where the harassing party is a workplace supervisor. Based upon the application of a negligence standard, the lower court granted AutoZone's Motion for Summary Judgment.

The trial court granted summary judgment in favor of AutoZone, Inc. and against Tiffany D. Shaw, expressly basing its decision upon the application of legal principles enunciated by the United States Court of Appeals for the Seventh Circuit in its decision of 123 F.3d 490 (7th Cir. 1997). The Petitioner in the instant case filed a timely Notice of Appeal to the United States Court of Appeals for the Seventh Circuit.

While the instant case was pending on appeal to the Seventh Circuit Court of Appeals, the United States Supreme Court reversed the Seventh Circuit Court of Appeals in its decision of *Ellerth v. Burlington Industries*, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998).

In the wake of Ellerth, the Seventh Circuit Court of Appeals nevertheless conducted a de novo review of the trial court record in the instant case, and thereafter affirmed the judgment of the District Court. In so doing, the Appellate Court found that AutoZone had proven both prongs of the affirmative defense set forth in Ellerth, even though such an affirmative defense did not exist at the time that the instant case was litigated within the lower court.

The Petitioner has filed a Petition for Writ of Certiorari based upon the issues and arguments presented herein.

ARGUMENT

I THE DECISION OF A SUBORDINATE EMPLOYEE TO REFRAIN FROM REPORTING SEXUAL HARASSMENT INFLICTED UPON HER BY A SUPERVISORY EMPLOYEE DOES NOT ALWAYS AND UNDER ANY CIRCUMSTANCE CONSTITUTE AN UNREASONABLE FAILURE TO TAKE ADVANTAGE OF PREVENTIVE OR CORRECTIVE OPPORTUNITIES PROVIDED BY THE EMPLOYER.

An actionable hostile workplace environment was created by Ms. Shaw's supervisor. However, no tangible employment action was taken in connection with such sexual harassment. Under these circumstances, AutoZone is subject to vicarious liability to Ms. Shaw as a result of her supervisor's conduct. However, AutoZone may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. *Ellerth v. Burlington Industries*, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998).

The Ellerth Court defined the two essential elements of the affirmative defense of which the employer may avail itself in such circumstances. Specifically, the Ellerth Court stated as follows:

> The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or

> corrective opportunities provided by the employer or to avoid harm otherwise.

Ellerth, 118 S.Ct. at 2270.

In the case at bar, it is undisputed that AutoZone had adopted an "anti-harassment policy" which it distributed to its employees. It is undisputed that the "anti-harassment policy" stated AutoZone's position that "sexual harassment will not be tolerated," and set forth multiple mechanisms for the resolution of employee complaints of sexual harassment. It is also undisputed that Tiffany Shaw did not formally report the occurrence of sexual harassment in accordance with the terms of AutoZone's sexual harassment policy. The question here presented is whether these facts, in and of themselves, establish both prongs of the two-prong affirmative defense enunciated in *Ellerth*.

The *Ellerth* Court defined, to a limited extent, the impact that an employee's decision not to report supervisory sexual harassment might have upon the issue of whether such decision was "unreasonable." Specifically, the Ellerth Court stated:

> And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. (emphasis added).

Ellerth, 118 S.Ct. at 2270.

The issues presented within the two elements of the *Ellerth* affirmative defense were characterized as presenting questions of fact, that is, issues to be proven by a defendant employer by a preponderance of the evidence. In the instant case, these very issues were decided as questions of law by the Appellate Court. Specifically, the Appellate Court cited Scrivner in support of the proposition that an employee fails to reasonably avail herself of the employer's preventive and corrective sexual harassment when she does not complain about the harasser's increasingly offensive conduct. *Scrivner v Socorro Independent School District*, 169 F.3d 969, at 971 (5th Cir. 1999).

Ellerth, however, never drew such a hard and fast rule. Scrivner and the Appellate Court's decision in the instant case are each predicated upon an absolutist construction of Ellerth. Such decisions are based upon the erroneous proposition that if an employer establishes a sexual harassment policy with multiple reporting mechanisms, then the decision of a subordinate employee to refrain from reporting sexual harassment inflicted upon her by a supervisory employee always and under every circumstance constitutes an unreasonable failure to take advantage of preventive or corrective opportunities provided by the employer.

Ellerth requires the trier of fact to go beyond a mere basic and simplistic determination of whether the employee made a report of supervisory sexual harassment. In those cases where the subordinate employee does not report such conduct, *Ellerth* requires the trier of fact to determine whether the decision of the employee in such an instance was "unreasonable."

In the instant case, the Appellate Court improperly construed *Ellerth* to assert that the demonstration of an employee's failure to use any complaint procedure provided by the employer will always suffice to satisfy the employer's burden under the second element of the affirmative defense. This misinterpretation of *Ellerth* was also manifested in *Scrivner*.

In cases where an aggrieved employee does not report sexual harassment in accordance with the terms of her employer's sexual harassment policy, the issue of that employee's reasonableness is a question of fact to be decided by the trier of fact; not a question of law to be decided by a mere fast and simple determination of whether a report was ever made.

II THE APPELLATE COURT COULD NOT PROPERLY GRANT SUMMARY JUDGMENT ON DE NOVO REVIEW OF THE TRIAL COURT RECORD, BASED UPON THE APPLICATION OF LEGAL PRINCIPLES WHICH DID NOT EXIST AND WHICH WERE THEREFORE NOT LITIGATED WHEN THE CASE WAS BEFORE THE TRIAL COURT.

The trial court granted summary judgment in favor of AutoZone, Inc. and against Tiffany D. Shaw, expressly basing its decision upon the application of legal principles enunciated by the United States Court of Appeals for the Seventh Circuit in its decision of *Ellerth v. Burlington Industries, Inc.* 123 F.3d 490 (7th Cir. 1997). The Petitioner filed a timely Notice of Appeal to the United States Court of Appeals for the Seventh Circuit. While the instant case was

pending on appeal to the Seventh Circuit Court of Appeals, the United States Supreme Court reversed the Seventh Circuit Court of Appeals in its decision of *Ellerth v. Burlington Industries*, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998).

In the wake of *Ellerth*, the Seventh Circuit Court of Appeals conducted a de novo review of the trial court record in the instant case, and thereafter affirmed the judgment of the District Court. In so doing, the Appellate Court found that AutoZone had proven both prongs of the affirmative defense set forth in *Ellerth*.

The Ellerth affirmative defense, upon which the Court of Appeals based its decision, did not exist at the time that the instant case was litigated at the trial court level. The Appellate Court reviewed a record which was developed at a time when both parties were necessarily wholly unaware of the legal principles by which it would thereafter be scrutinized. The Appellate Court explained its conduct in this regard, stating "this case can be decided on the present record because the undisputed facts which we rely upon were fully developed in discovery." This statement is based upon the Appellate Court's conclusion that Ms. Shaw's decision not to report sexual harassment, regardless of the reasons underlying such a decision, was per se unreasonable.

The parties should have an opportunity to develop the record on the issue of whether Ms. Shaw's decision not to report sexual harassment was reasonable. The parties did not have that opportunity in the instant case, since the law giving rise to such an analysis simply did not exist when the case was pending before the trial court.

CONCLUSION

When an aggrieved employee does not report sexual harassment in accordance with the terms of her employer's sexual harassment policy, the issue of that employee's reasonableness is a question of fact to be decided by the trier of fact; not a question of law to be decided by a simple determination of whether a report was ever made. The parties were never able to explore the reasons underlying Ms. Shaw's decision not to report the sexual harassment inflicted upon her by her supervisor, since the law giving rise to such an analysis did not exist at the time that this case was pending before the trial court.

The trial court's decision was based upon a decision of the United States Court of Appeals for the Seventh Circuit which was thereafter itself reversed by the United States Supreme Court. In the instant case, the United States Court of Appeals for the Seventh Circuit misconstrued Ellerth to assert that an employee's decision not to report sexual harassment always and under every conceivable circumstance constitutes an unreasonable failure to take advantage of preventive or corrective opportunities provided by the employer.

The Court should grant certiorari to review this important issue involving the interpretation of its recent Ellerth decision; reverse the United States Court of Appeals for the Seventh Circuit; and order that the case be remanded to the District Court for further proceedings consistent with its ruling.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 97-3654

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

TIFFANY D. SHAW v. AUTOZONE, INCORPORATED, DONALD A. NOBLE

January 27, 1999, Argued
June 8, 1999, Decided

COUNSEL: For TIFFANY D. SHAW, Plaintiff - Appellant: James W. Mertes, PIGNATELLI, LISTON & MERTES, Rock Falls, IL USA.

For AUTOZONE, INCORPORATED, DONALD A. NOBLE, Defendants - Appellees: Arthur B. Smith, Jr., OGLETREE, DEAKINS, MURPHY, SMITH & POLK, Chicago, IL USA. Richard A. Hammond, KULLMAN, INMAN, BEE, DOWNING & BANTA, New Orleans, LA USA. Robert B. Worley, Jr., THE KULLMAN FIRM, New Orleans, LA.

JUDGES: Before Eschbach, Flaum and Manion, Circuit Judges.

OPINION BY: MANION

OPINION: Manion, Circuit Judge. The district court granted summary judgment to AutoZone on Tiffany Shaw's claim that her supervisor, Donald Noble, sexually harassed her by

creating a hostile work environment. While the case was pending on appeal, the Supreme Court changed the standard of employer liability for sexual harassment perpetrated by a supervisor. See Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). Shaw argues that because the district court applied the wrong liability standard to her case, this court should vacate summary judgment. AutoZone counters that the record supports the affirmative defense recognized in Ellerth. See 118 S. Ct. at 2270. Because the undisputed facts establish that AutoZone is entitled to the Ellerth affirmative defense, we affirm.

I. Facts

Tiffany Shaw was an assistant manager of AutoZone's Rock Falls, Illinois, store from February to June of 1995. AutoZone is an automotive parts retailer with many stores nationwide. The store manager in Rock Falls was Donald Noble. Noble's supervisor was Area Advisor Dave Hunsche; Hunsche's supervisor was District Manager Steve Lang.

Shaw submitted an employment application to Noble at the Rock Falls store. Noble sent the application to Steve Dauw, a recruiter who then reviewed the application along with other people in AutoZone's management. Noble was asked for his input in the hiring process, but Dauw conducted the employment interview and offered Shaw the job. Store managers did not have authority to hire, fire, or promote employees on their own. Area advisors made hiring and promotion decisions, and termination decisions were made by an area advisor or district manager after consulting with the

director of human resources or the equal opportunity manager.

When AutoZone hired Shaw, it provided her with a copy of the AutoZone Handbook and Safety Booklet, and it informed her that it was her "responsibility to read and learn the policies and procedures contained in the AutoZone Handbook and Safety Booklet." Shaw signed a form acknowledging her receipt of the handbook and her understanding of her responsibility to read and learn the policies and procedures contained in it.

The AutoZone Handbook contained a sexual harassment policy which provided:

> Sexual Harassment
>
> AutoZone will not tolerate sexual harassment. Such conduct or the encouragement of such conduct may result in termination.
>
> AutoZone's stance on this issue extends to all AutoZoners, as well as people outside AutoZone that we do business with--our customers, suppliers and vendors. Every AutoZoner needs to be aware of AutoZone's sexual harassment policy.
>
> Sexual harassment means unwelcome sexual advances, verbal or physical. Sexual harassment occurs when:

* Submission to such conduct becomes, either explicitly or implicitly, a term or condition of employment.

* Submission to, or rejection of, such conduct by an individual becomes the basis for employment decisions affecting any individual.

* Such conduct interferes with your work or creates an uncomfortable working environment.

The bottom line is, all AutoZoners should be treated with respect and AutoZone as a company will not tolerate anything less.

We want you to know that AutoZone is committed to having a cooperative and harassment-free work environment. AutoZoners who may have been subject to sexual harassment should notify the store Manager at once or report the situation directly to the [Area Advisor] or the [District Manager]. The AutoZoner may also directly contact the Director of Personnel Services or the Equal Employment Manager at Mail Station 8029.

Any AutoZoner who receives a complaint or becomes aware of a sexual harassment situation, should report the allegation immediately. Management action will be taken to investigate each reported allegation

> thoroughly in as confidential a manner as possible. (Emphasis in original.)

AutoZone provides each new employee with a copy of its sexual harassment policy, as contained in its Employment Manual. In addition to adopting this sexual harassment policy and distributing it to its employees, AutoZone periodically provides training sessions for its managers concerning its sexual harassment policies and AutoZone's guidelines. Don Noble testified in his deposition that over the course of his employment with AutoZone, he attended approximately twenty management meetings which included training or conversations on AutoZone's sexual harassment policies and procedures and the handling of sexual harassment claims.

According to Shaw, Noble began making comments about her physical attributes within her first week of employment with AutoZone. In mid-May 1995, Shaw claims the comments became more explicit with Noble asking her questions about her sex life, including inquiries about whether Shaw masturbated. Noble discussed pornographic movies and suggested ways for her to have better sex with her husband. Shaw also testified that Noble had told her that he had told Wroy Kizer, another store manager, that Shaw and another female employee were part of his "harem." Shaw stated that Noble continued to make sexual comments until she quit on June 6, 1995.

In her deposition, Shaw testified that she quit for "[a] lot of different reasons," "my uncomfortableness about being around Don," as well as "the lack of support from Don as a manager, letting the employees take advantage of me or not supporting me." Shaw also stated in her deposition that she quit because she was scheduled to have the day off on

Thursday and "they were going to make me give up my Thursday off and Don would not close the store . . . ." She quit by throwing her keys at Noble and telling him with profanity what he could do with them.

While working at AutoZone, Shaw did not report Noble's conduct to anyone nor did she tell Noble to stop making the offensive comments. After Shaw quit, Hunsche, the Area Advisor, attempted to contact Shaw three times to conduct an exit interview, but Shaw did not return his phone calls.[1] Instead, after exhausting her administrative remedies, Shaw filed suit alleging sexual harassment claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-15, against both AutoZone and Noble. Shaw also alleged a claim against Noble for intentional infliction of emotional distress. The parties stipulated to the dismissal of the two claims against Noble individually, leaving only the claim of sexual harassment against AutoZone. AutoZone moved for summary judgment on that claim. On September 19, 1997, the district court granted summary judgment to AutoZone on the basis of our decision in Jansen v. Packaging Corp. of America, 123 F.3d 490, 493 (7th Cir. 1997) (en banc), which held that in a case of hostile work environment sexual harassment by a supervisor, the standard for the employer's liability is negligence. The district court found that AutoZone was not negligent because it promulgated a sexual harassment policy and because Shaw had failed to notify anyone at AutoZone of Noble's conduct. Shaw filed a timely notice of appeal, but this court stayed briefing pending the Supreme Court's decision in Ellerth.

II. Analysis

This court reviews a grant of summary judgment de novo, drawing all reasonable inferences from the facts in favor of the nonmovant. See Parkins v. Civil Constructors of Illinois, Inc., 163 F.3d 1027, 1032 (7th Cir. 1998). Summary judgment is appropriate only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "We may affirm on any ground for which there is support in the record." Parkins, 163 F.3d at 1032.

In Ellerth, the Supreme Court held that employers are strictly liable for a supervisor's sexual harassment of a subordinate, but that employers may avoid that liability by proving an affirmative defense:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an anti-harassment policy with

> complaint procedures is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

Ellerth, 118 S. Ct. at 2270.

It is unclear whether Noble is a "supervisor" as that term is used in Ellerth, because AutoZone presented evidence that Noble lacked the authority to hire, fire or promote employees. See Parkins, 163 F.3d at 1034 ("The essence of supervisory status is the authority to affect the terms and conditions of the victim's employment. This authority primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee. Absent an entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes of imputing liability to the employer."). However, we need not decide that issue because, for purposes of summary judgment, AutoZone does not contest Noble's status as a "supervisor." Instead, AutoZone asserts that it is entitled to summary judgment based on the Ellerth affirmative defense.

Because Shaw did not suffer any tangible employment action, AutoZone may assert the Ellerth affirmative defense. To avoid liability AutoZone must first prove that it exercised "reasonable care to prevent and correct promptly any sexually harassing behavior . . . ." Ellerth, 118 S. Ct. at 2270. While not required as a matter of law, id., the existence of an appropriate anti-harassment policy will often satisfy this first prong, see Scrivner v. Socorro Indep. Sch. Dist., 169 F.3d 969, 971 (5th Cir. 1999), because "'Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms.'" Parkins, 163 F.3d at 1037 (quoting Ellerth, 118 S. Ct. at 2270).

In this case, AutoZone adopted an antiharassment policy which it distributed to each of its employees. While Shaw testified in her deposition that she had never seen AutoZone's sexual harassment policy, that is irrelevant because it is undisputed that she received a copy of the policy and that she was required as a condition of her employment to read and comply with both the policy and the other terms contained in the Employee Handbook. She even signed an acknowledgment form stating "I understand it is my responsibility to read and learn the policies and procedures contained in the AutoZone Handbook and Safety Booklet." Under these circumstances, even if Shaw did not have actual knowledge of the policy, she had constructive knowledge of the anti-harassment policy. Cf. Betaco, Inc. v. Cessna Aircraft Co., 32 F.3d 1126, 1136 (7th Cir. 1994) ("As a result of [the duty to read the contract] a person who signs a written contract is bound by its terms regardless of his or her failure to read and understand its terms."); 24 Hour Fitness, Inc. v. The Superior Court of Sonoma County, 66 Cal. App. 4th 1199 (1998) (employee bound by terms of handbook where she signed a form acknowledging she received and read the

handbook, even though she now claims she did not read the handbook).

This anti-harassment policy made clear AutoZone's stand that sexual harassment will not be tolerated, and provided for multiple mechanisms for the prompt resolution of complaints. It is both specific and detailed, and it allows the "complainant to circumvent the supervisory chain of command." Jansen, 123 F.3d at 498 (Flaum, J., concurring). "Rather than criticize, we should encourage any employer who constructs multiple mechanisms for detecting and correcting harassment." Parkins, 163 F.3d at 1037. In addition to distributing this policy to its employees, AutoZone regularly conducted training sessions on sexual harassment.

These undisputed facts establish, as a matter of law, that AutoZone exercised reasonable care to prevent sexual harassment, especially when contrasted with Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998), the companion case to Ellerth, in which the Supreme Court held that the employer failed to exercise reasonable care to prevent sexual harassment because it failed to disseminate its policy against sexual harassment and because the supervisors were "completely isolated from the City's higher management." 118 S. Ct. at 2293. See also, Rubidoux v. Colorado Mental Health Inst., 1999 U.S. App. LEXIS 6916, 1999 WL 203145 (10th Cir. 1999) (noting that in Faragher the Court emphasized "the degree of hostility and unchecked authority as well as plaintiff's 'complete isolation' from the City's higher management which rose to an actionable level"). Conversely, in this case not only did AutoZone distribute its sexual harassment policy to every one of its employees, it also regularly trained its managers regarding its policy. Moreover, AutoZone's supervisors, such

as Noble, were not isolated from higher management. Rather, Noble's immediate supervisor, Hunsche, visited the store approximately every two to three weeks to discuss various issues, and during these visits Shaw could have spoken with him about any problems and he could observe first-hand any issues, including any sexual harassment. Shaw also attended a manager's meeting with the District Manager Steve Lang and all other managers in the area in March 1995 and could have used this opportunity to inform AutoZone of the problems. Shaw also had the opportunity to speak with Lang and a regional vice president in mid-May 1995 when they visited the Rock Falls store for the day. Taking the facts in the light most favorable to Shaw, the policy did not succeed in this case, but the law does not require success--it only requires that an employer act reasonably to prevent sexual harassment. See Parkins, 163 F.3d at 1036 ("The law does not even require that the employer's actions prevent harassment, but merely that its response was reasonably likely to prevent future harassment."). The facts of this case are more than enough to establish that, as a matter of law, AutoZone exercised reasonable care to prevent sexual harassment. See Scrivner, 169 F.3d at 971 (affirming grant of summary judgment to employer based on Ellerth affirmative defense, where the employer adopted an anti-harassment policy). See also Parkins, 163 F.3d at 1035-1036 (holding that employer exercised reasonable care to prevent sexual harassment where it adopted a policy prohibiting sexual harassment which provided multiple complaint mechanisms).[2]

The first prong of the Ellerth affirmative defense also requires AutoZone to prove that it exercised reasonable care to respond to the sexual harassment. Shaw, however, never complained of the alleged harassment. Because Shaw never informed AutoZone of Noble's alleged harassment and

because it had no reason to know of the harassment, there was nothing for AutoZone to respond to. Under these circumstances, AutoZone's response (to do nothing beyond its reasonable attempts to prevent sexual harassment) was reasonable.[3] Because AutoZone has presented undisputed evidence establishing that it acted reasonably to prevent and to respond to sexual harassment, it has satisfied the first prong of Ellerth's affirmative defense.

To succeed on the affirmative defense, AutoZone must also establish that Shaw "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Ellerth, 118 S. Ct. at 2270. The undisputed facts establish that AutoZone adopted a sexual harassment policy which established multiple methods for an employee to complain of sexual harassment. Shaw failed to take advantage of any of these mechanisms. Shaw concedes that she never alerted anyone at AutoZone to Noble's inappropriate activities. She did not even tell Noble to stop making the offensive comments. She also ignored AutoZone's three attempts to determine what caused her to quit her job. As we have often said, "'the law against sexual harassment is not self-enforcing' and an employer cannot be expected to correct harassment unless the employee makes a concerted effort to inform the employer that a problem exists." Parkins, 163 F.3d at 1038 (quoting Perry, 126 F.3d 1010 at 1014). In short, Shaw acted in precisely the manner that a victim of sexual harassment should not act in order to win recovery under the new law. See also Scrivner, 169 F.3d at 971 (holding that plaintiff failed to reasonably avail herself of the employer's preventive and corrective sexual harassment policies when she never complained about the harasser's increasingly offensive behavior).

Shaw argues in response that it was reasonable for her not to follow AutoZone's complaint mechanism because "she didn't feel comfortable enough with anyone at AutoZone to speak with them about the offensive and repulsive sexual conduct displayed towards her by Noble."[4] While a victim of sexual harassment may legitimately feel uncomfortable discussing the harassment with an employer, that inevitable unpleasantness cannot excuse the employee from using the company's complaint mechanisms. Accordingly, we conclude that an employee's subjective fears of confrontation, unpleasantness or retaliation do not alleviate the employee's duty under Ellerth to alert the employer to the allegedly hostile environment. Shaw's failure to do so here satisfies AutoZone's burden under the second prong of the Ellerth affirmative defense. See Ellerth, 118 S. Ct. at 2270 (a demonstration of an unreasonable failure to use any complaint procedure provided by the employer "will normally suffice to satisfy the employer's burden under the second element of the defense").

In closing, we note that while some cases which were decided pre-Ellerth might require remand, see, e.g., Rubidoux, 1999 WL 203145; Burrell v. Star Nursery, Inc., 170 F.3d 951 (9th Cir. 1999); Wilson v. City of Plano, 164 F.3d 900 (5th Cir. 1999), this case can be decided on the present record because the undisputed facts which we rely upon above were fully developed in discovery. Specifically, Shaw's attorney questioned AutoZone extensively about its sexual harassment policy and its training and response to sexual harassment complaints, and AutoZone questioned Shaw at length about witnesses to the harassment and about whether and to whom she had complained. Moreover, in this case the parties had originally briefed the summary judgment motion based on the question of supervisory liability, although the district court

did not apply that law, instead relying on our decision in Jansen. Thus, while the standard for liability has changed, the record and arguments were fully developed for application of the new standard. Therefore, remand is unnecessary.[5] See, e.g., Scrivner, 169 F.3d 969 (applying the Ellerth/Faragher affirmative defense on appeal and affirming summary judgment based on the complete record presented to the district court).

----------Footnotes----------

[1] Normally, the store manager would conduct the exit interview, but given the circumstances of her departure, Hunsche contacted her instead.

[2] In Parkins, we held that the harassers were not supervisors. Accordingly, we applied the standard for co-worker harassment, as opposed to the supervisory liability standard. However, the reasonableness of the employer's actions in preventing and responding to sexual harassment is relevant under both standards, the difference being who bears the burden of proof. Wilson v. Tulsa Junior College, 164 F.3d 534, 541 (10th Cir. 1998).

[3] Shaw argues that AutoZone unreasonably responded to the sexual harassment because Wroy Kizer did not engage in any preventive or corrective measures in response to Noble's comment to him that Shaw was part of his harem. According to Shaw, Noble made this comment when "the other managers were saying things that he had two females on his staff which in AutoZone is unusual and that they were saying stuff about that, so he retorted by saying, 'Yeah, I've got a harem,' or something in that regard." Even assuming that Noble made this comment--something both Kizer and Noble

dispute--this stray remark was too innocuous to cause a reasonable person to believe that Noble was sexually harassing Shaw such that some sort of corporate response was necessary.

[4] Shaw also seems to argue that it was reasonable for her not to have used the complaint mechanism because she had never seen AutoZone's sexual harassment policy. However, as we have already held, Shaw had constructive notice of this policy. See supra at 8.

[5] In fact, in Faragher the Supreme Court applied the new affirmative defense standard to the facts as previously developed by the parties at the summary judgment stage.

No. 96 C 50111

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
WESTERN DIVISION

TIFFANY D. SHAW,
Plaintiff,

v.

AUTOZONE, INC., and DONALD A. NOBLE,
Defendants.

September 19, 1997, Decided
September 19, 1997, Filed

NOTICE: NOT FOR PUBLICATION

COUNSEL: For PLAINTIFF: James W. Mertes, Pignatelli & Pignatelli, Rock Falls, IL.

For DEFENDANTS: Arthur B. Smith, Jr., Tracey L. Truesdale, Murphy, Smith & Polk, Chicago, IL.

For DEFENDANTS: Richard A. Hammond, Robert B. Worley, Jr., Kullman, Inman, Bee, Downing & Banta, New Orleans, LA.

JUDGES: PHILIP G. REINHARD, JUDGE, UNITED STATES DISTRICT COURT.

OPINION BY: PHILIP G. REINHARD

OPINION: MEMORANDUM OPINION AND ORDER

INTRODUCTION

Plaintiff, Tiffany D. Shaw, filed a three-count complaint against defendants, Donald A. Noble and AutoZone, Inc., alleging in Count I a claim against Noble for sexual harassment under Title VII of the Civil Rights Act of 1964, in Count II a sexual harassment claim against AutoZone and in Count III a claim for intentional infliction of emotional distress against Noble under Illinois law. Defendants moved to dismiss Counts I and III against Noble, and, based upon a stipulation submitted by the parties, the court dismissed both counts. Jurisdiction under the remaining Count II is premised on 28 U.S.C. § 1331, and venue is proper as a substantial part of the complained of conduct occurred in this district and division. AutoZone has moved for summary judgment as to Count II.

FACTS

The following facts are taken from the parties' respective statements of material fact filed pursuant to Local General Rules 12M and 12N.[1]

Beginning in February 1995, plaintiff was employed by AutoZone as an assistant store manager in its Rock Falls, Illinois, store. Noble was the store manager at the time plaintiff was hired and continued in that position through June 6, 1995, plaintiff's last day of work. Noble answered to Dave Hunnsche, area advisor for AutoZone, who in turn was supervised by Steve Lang, a district manager. Lang answered to the regional vice-president, Bill McCulley.

Plaintiff discussed with Noble a position at the store. Plaintiff completed an application which Noble retained at the store, and Noble telephoned a recruiting person, Steve Dauw, who then reviewed plaintiff's application along with others. After reviewing plaintiff's application, Dauw asked Noble what he thought, and Noble responded he had no problem with plaintiff being hired as an assistant manager. Dauw then formally interviewed plaintiff and offered her the position. According to Smith, all decisions to hire or promote must be made by an area advisor, a recruiter or AutoZone personnel above the store manager level. The declaration of Alison Smith, AutoZone's director of human resources administration, states that an AutoZone store manager does not have the power to hire, fire or promote employees. All decisions to terminate must be approved by an area advisor or district manager after consultation with Smith or the equal employment opportunity manager. Similarly, the undisputed evidence shows that Noble did not have authority to create employee work schedules for the store.

Plaintiff stated in her deposition that beginning in mid-May 1995 Noble started asking her questions about her sex life. According to plaintiff, Noble asked if she masturbated and what she did when her husband went out of town. Noble also suggested that plaintiff and her husband use ice to have better sex. He discussed pornographic movies and mentioned that old girlfriends had suitcases of sexual toys. Noble also made other comments of a sexual nature to plaintiff from mid-May until June 6, 1995 when plaintiff quit.[2]

Plaintiff never reported Noble's conduct or comments to anyone at or above Noble's level in the company. Hunnsche stated that he was never made aware of Noble's conduct until plaintiff filed her lawsuit. Nor did she attempt to get Noble to

stop. Plaintiff explained that she did not try to get Noble to stop because he "was [her] employer." Plaintiff also did not tell any employee at the store that Noble's conduct made her upset or uncomfortable. She did not because she did not trust any of the employees to speak to them on that level.

On June 6, 1995, plaintiff approached Noble at the store, threw her store keys at him and told him to "take [the] keys and shove them up [his] ass." Not surprisingly, plaintiff also quit on that date. Noble advised Hunnsche of plaintiff's quitting, and Hunnsche attempted to contact her to conduct an exit interview. Hunnsche called plaintiff twice at home, leaving a message the second time, and asked Noble, if he saw plaintiff, to let her know Hunnsche wanted to talk to her. Plaintiff never contacted Hunnsche, and he never spoke to plaintiff after she quit.

According to Smith, AutoZone had an employee handbook in effect during plaintiff's employment. The handbook contains a section which defines sexual harassment and which states that any employee who believes they are a victim of sexual harassment should report the behavior to their store manager, area advisor, district manager or directly to the director of personnel services or the equal employment opportunity manager. The policy also provides that management will investigate any report of sexual harassment thoroughly and in as confidential a manner as possible. Included as an exhibit to Smith's declaration is an acknowledgement signed by plaintiff and dated February 14, 1995 which states, in part, that it is the signator's responsibility to read and learn the policies and procedures contained in the handbook. Plaintiff denied ever seeing a sexual harassment policy for AutoZone.

CONTENTION

AutoZone contends it is entitled to summary judgment because plaintiff never reported the alleged sexual harassment to anyone at AutoZone and AutoZone did not know or have reason to know of the alleged harassment. Plaintiff responds that she was not required to report the harassment to anyone above the rank of store manager and that AutoZone had reason to know of Noble's conduct because it occurred in the presence of other employees and another store manager. Alternatively, plaintiff argues that Noble's conduct is imputed to AutoZone as a matter of agency because of his supervisory status.

DISCUSSION

Summary judgment is appropriate whenever the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Oates v. Discovery Zone, 116 F.3d 1161 (7th Cir. 1997). In considering a motion for summary judgment, the court accepts all facts and inferences in a light most favorable to the non-moving party. Id. If no reasonable jury could find for the party opposing the motion, it must be granted. Id.

The parties dispute the significance of Noble's position in AutoZone's managerial hierarchy as it relates to AutoZone's ultimate responsibility for Noble's conduct via agency principles. The Seventh Circuit, however, has recently resolved that dispute in the context of a hostile environment sexual harassment claim.[3] In Jansen v. Packaging Corp. of America, 1997 U.S. App. LEXIS 22266, Nos. 95-3128 and 96-1361 (7th Cir. Aug. 12, 1997), the Seventh Circuit, in an en banc opinion, decided, among other things, that in the case

of hostile work environment sexual harassment by a supervisor, the standard for the employer's liability is negligence. Jansen, slip op. at 5. While the majority holding is expressed per curiam, it is also explained via a separate opinion written by Judge Flaum.

In discussing the negligence standard, Judge Flaum identified the appropriate inquiry as whether the employer took due care to prevent harassment and to respond to complaints of harassment. Jansen, slip op. at 23. In the case of a supervisor who harasses, as opposed to a co-employee, however, the duty of care is heightened and "should apply both in terms of the machinery available to employees to complain of harassment and in terms of a company's duty to investigate and respond effectively to such complaints." Id. at 25.

In the present case, plaintiff has not submitted evidence, even when viewed in a light most favorable to her, that would allow a reasonable jury to conclude that AutoZone acted negligently in respect to Noble's harassment. First, and foremost, plaintiff never complained to anyone in the company. While plaintiff's deposition testimony is that fellow employees may have overheard some of Noble's comments (none have so stated), the absence of any complaints by plaintiff to these employees vitiates any reasonable expectation of their reporting the harassment to higher ups in the company. Moreover, the comment made by Noble in front of another store manager that plaintiff and another female were his "harem" was only an isolated comment of an arguably offensive nature. Furthermore, there is no evidence that plaintiff ever expressed any displeasure to the other manager or complained to him of the conduct.

Second, under Jansen the fact that the harasser was a supervisor does not automatically carry the day for plaintiff.[4] In this court's interpretation of Jansen, Noble's status in the managerial hierarchy is just one factor to be considered in the negligence equation. In this case, it is an extremely weak factor. The undisputed evidence shows that a store manager is near the bottom of the managerial totem pole. There were several layers of management between Noble and the corporate office. The undisputed evidence also establishes that while Noble was allowed some input on hiring and firing, he had no say in the ultimate decision. Nor could he independently promote or demote any employees. Noble's duties as manager were essentially limited to the day-to-day operations of the store. Plaintiff's contention that Noble was at the zenith of managerial responsibility for her particular store is belied by the fact that the area advisor was at the store often and the district manager was involved in personnel decisions for the store. The evidence shows the store was one link in a large network of stores which were operated and controlled by a multilevel managerial system. Noble was a small player in this scheme.

Finally, in considering whether AutoZone has taken due care to prevent harassment and to respond to complaints of harassment, the undisputed evidence shows that the company had an established, written policy pertaining to sexual harassment, which not only defined sexual harassment and prohibited it, but which also identified numerous managerial personnel to whom an employee could complain. Additionally, the policy promised a thorough investigation and, if possible, confidentiality. Furthermore, the policy was included in an employee handbook given to plaintiff at the time she started. Plaintiff also signed a statement acknowledging the need for her to read and understand the

policies in the handbook. Plaintiff's unsupported statement that she was never aware of the sexual harassment policy is insufficient to create a question of material fact in this regard as it is entirely inconsistent with her acknowledgement signed at the time she started and, assuming its truth, evidences a disregard of the caution to plaintiff that she should read the policies in the handbook, including the one on sexual harassment.

In conclusion, there is no evidence here from which a reasonable jury could conclude that AutoZone was negligent in either its policy for reporting harassment or in its duty to investigate and respond effectively to complaints of sexual harassment. Plaintiff had reasonable avenues of redress which, for whatever reason, she opted not to take. While AutoZone has a heightened duty of care to protect plaintiff from sexual harassment, there is no evidence that it did not fulfill its duty in this case and it is entitled to summary judgment on plaintiff's sexual harassment claim.

CONCLUSION

For the foregoing reasons, the court grants defendant, AutoZone's, motion for summary judgment and dismisses this case in its entirety.

ENTER:

PHILIP G. REINHARD, JUDGE

UNITED STATES DISTRICT COURT

DATED: September 19, 1997

----------Footnotes----------

[1] Local General Rules 12M and 12N are designed to assist the district court in maintaining the integrity of its calendar and in streamlining its caseload. Midwest Imports, Ltd. v. Coval, 71 F.3d 1311, 1316 (7th Cir. 1995). As such, the Seventh circuit has consistently and repeatedly required strict compliance. Id. Unfortunately, despite this emphasis on compliance with Rules 12M and 12N, frequently parties fail to comply, partly or entirely, which creates unnecessary work for the opposing party and the court.

In the present case, the court commends the parties for their diligent and thorough efforts at complying with Rules 12M and 12N. Such compliance has facilitated this court's consideration and disposition of the motion for summary judgment.

[2] Noble denies making any sexual comments to plaintiff or asking her questions about her sex life. Such a question of fact is not material to the present motion for summary judgment. For purposes of the motion, the court accepts plaintiff's version.

[3] As opposed to a quid pro quo sexual harassment claim which plaintiff has not alleged in this case.

[4] The parties have briefed this issue as one of imputed negligence based on Noble's supervising status. In this court's view, the imputed negligence analysis is no longer viable after Jansen.

No. 97-3654

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

TIFFANY D. SHAW v. AUTOZONE, INCORPORATED,

Filed: July 19, 1999

ORDER

On consideration of the petition for rehearing en banc filed by Plaintiff-Appellant on June 22, 1999, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Supreme Court, U.S.
FILED
DEC 13 1999
OFFICE OF THE CLERK

(2)

No. 99-668

In The

Supreme Court of the United States

October Term, 1999

TIFFANY D. SHAW

Petitioner,

vs.

AUTOZONE, INC.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT B. WORLEY, JR.*
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18pp

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

There is no parent or publicly held company owning 10% or more of AutoZone stock.

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STATEMENT OF THE CASE

A. There Are No Issues Warranting Review

This Petition for a Writ of Certiorari concerns an affirmance of a summary judgment that was entered in favor of the employer, AutoZone, Inc. ("AutoZone"), in a case of alleged sexual harassment. More specifically, this Petition challenges the Seventh Circuit's application of the affirmative defense established by this Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Petitioner, Tiffany Shaw, does not seek to challenge the legality of the defense. Instead, Petitioner asserts the Seventh Circuit should not have applied the defense--contending that under the facts of this case the defense was not satisfied. Petitioner contends the Seventh Circuit should have remanded the case for the District Court to apply the defense rather than deciding the matter itself. Accordingly, this Petition is fact-based, and presents no issue of law for this Court to address. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987) ("A court of law, such as this Court is, rather than a court for corrections of errors in fact finding, cannot undertake to review concurrent findings of fact by two counts below in the absence of a very obvious and exceptional showing of error.")

B. The Specific Allegations of Sexual Harassment Are Not at Issue

In her Statement of the Case, Petitioner highlights the specific instances of alleged sexual harassment; however, the issue before this Court is not whether the harassment took place, or whether such conduct rises to the level of actionable harassment even if it did occur. The District Court granted summary judgment, and the Seventh Circuit affirmed, on the basis that AutoZone could not be liable due to Petitioner's unreasonable failure to take advantage of the corrective

opportunities AutoZone provided by virtue of its sexual harassment complaint procedure. Petitioner's reference to the specific allegations is immaterial at this stage of the proceedings.

C. The Petition Fails to Set Forth in Detail How Petitioner Failed to Report the Alleged Harassment

Petitioner concedes that she did not report the alleged harassment (Petitioner's Brief at 6), but she gives that important fact short shift. A descriptive account of her inaction would be more instructive.

AutoZone is in the automotive parts business. AutoZone employed Petitioner as an assistant store manager in its Rock Falls, Illinois, store beginning in mid-February 1995, until June 6, 1995. (R. 28, App. at 6, 15.) Donald A. Noble became the store manager of AutoZone's Rock Falls store around May 1993, and remained in this position during the entire period in 1995 when AutoZone employed Petitioner. (R. 28, App. at 21-22.)

AutoZone's employee handbook, which was in effect during Petitioner's employment with AutoZone, prohibits sexual harassment and states that an employee who believes he/she is a victim of sexual harassment should report the offending behavior to his/her Store Manager, Area Advisor, District Manager, or directly to the director of personnel services or the Equal Employment Opportunity Manager in Department 8029 at AutoZone's corporate headquarters in Memphis, Tennessee. (R. 28, App. at 36-37, 42-45.) Petitioner received a copy of this handbook on February 14, 1995, as evidenced by the acknowledgment form she signed that is retained in her personnel file. (R. 28, App. at 36-37.) Petitioner never contacted anyone who worked for AutoZone in any capacity regarding the

alleged sexually harassing behavior of Donald Noble. (R. 28, App. 10, 14.) Petitioner testified that during her employment with AutoZone, from February to June 1995, she saw Noble's supervisor, Dave Hunsche, in the store every two to three weeks. Petitioner also attended a manager's meeting, which District Manager Steve Lang and all of the other managers in the area attended in March 1995. Steve Lang also accompanied the AutoZone Vice President on a visit to the Rock Falls store in May 1995; however, Petitioner did not, on any of these occasions, complain that Mr. Noble sexually harassed her. (R. 28, App. at 8-10, 14.)

After Petitioner quit, Mr. Hunsche attempted to contact her on three separate occasions in order to conduct an exit interview to determine why she quit. Petitioner did not return Mr. Hunsche's calls or meet with him. (R. 28, App. at 33.) Mr. Hunsche had no knowledge that Petitioner ever claimed that she was sexually harassed while working at AutoZone until three months after she quit and EEOC administrative proceedings had commenced as a prelude to the instant action. (R. 28, App. at 32, 34.)

D. Petitioner Incorrectly States Why the Seventh Circuit Applied the Affirmative Defense

Petitioner states that the Seventh Circuit held that an employee's failure to use an employer's complaint procedure will always satisfy the employer's burden under the second element of the affirmative defense (Petitioner's Brief at 8). Petitioner further states that the parties should have an opportunity to develop the record on the issue of whether Petitioner's decision not to report sexual harassment was reasonable (Petitioner's Brief at 9). The Seventh Circuit affirmed the summary judgment on de novo review because it had sufficient evidence to apply the affirmative defense. *Shaw v. AutoZone*, 180 F.3d. 806, 813 (7th Cir. 1999). Petitioner had

already answered comprehensive questions at her deposition about the sexual harassment complaint procedure and the reasons for her abject failure to report the alleged harassment. Petitioner's argument that it was reasonable for her not to follow AutoZone's complaint mechanism because she did not feel comfortable speaking to anyone at AutoZone about the alleged conduct was specifically rejected by the court. The court acknowledged Petitioner's argument, but concluded that, "an employee's subjective fears of confrontation, unpleasantness or retaliation do not alleviate the employee's duty under *Ellerth* to alert the employer to the allegedly hostile environment." *Shaw*, 180 F.3d at 813. The Petitioner is wrong to say that the Seventh Circuit incorrectly applied the affirmative defense because it did not have the facts necessary to do so is incorrect. The Seventh Circuit considered Petitioner's failure to complain, as well as her reasons for that failure, when it applied the affirmative defense in favor of AutoZone.

REASONS FOR DENYING THE WRIT

I. Petitioner Failed to Do Anything to Report the Alleged Harassment, and Given That Fact, Her Inaction was Unreasonable and There is Nothing for This Court to Consider

Petitioner correctly states that this Court established an affirmative defense to claims of sexual harassment by supervisors when the employee has suffered no tangible employment action. More specifically, this Court held in *Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998)* and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), that the employer is protected from liability when it can show: (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) that the

plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. Petitioner concedes that she suffered no tangible employment action (Petitioner's Brief at 5), so this is a case in which the affirmative defense is applicable. Petitioner concedes that AutoZone had an anti-sexual harassment policy with multiple reporting mechanisms (Petitioner's Brief at 6), thus satisfying the first prong of this defense. Petitioner further concedes that she failed to report the alleged harassment. (Petitioner's Brief at 6). Petitioner argues, however, that it is not always unreasonable for an employee to fail to report alleged sexual harassment, and that this case should be remanded to the District Court to consider whether her silence was reasonable. AutoZone respectfully suggests that Petitioner's utter failure to do anything to notify management is precisely what the Supreme Court contemplated when it established the affirmative defense insulating employers from liability. Therefore, Petitioner's request for review should be denied.

The evidence plainly establishes that Petitioner did absolutely nothing to take advantage of the opportunities AutoZone gave her to complain and offered no plausible explanation for her failure to do so. In order to understand how unreasonable Petitioner was, the language of the policy itself should be considered, as that demonstrates how allegedly aggrieved employees were urged to come forward. This policy reads in pertinent part as follows:

> **Sexual Harassment**
>
> AutoZone will not tolerate sexual harassment. Such conduct or the encouragement of such conduct may result in termination.

AutoZone's stance on this issue extends to all AutoZoners, as well as people outside AutoZone that we do business with -- our customers, suppliers and vendors. Every AutoZoner needs to be aware of AutoZone's sexual harassment policy.

Sexual harassment means unwelcome sexual advances, verbal or physical. Sexual harassment occurs when:

- Submission to such conduct becomes, either explicitly or implicitly, a term or condition of employment.

- Submission to, or rejection of, such conduct by an individual becomes the basis for employment decisions affecting any individual.

- Such conduct interferes with your work or creates an uncomfortable working environment.

The *bottom line is, all AutoZoners should be treated with respect and AutoZone as a company will not tolerate anything less.*

We want you to know that AutoZone is committed to having a cooperative and harassment-free work environment. AutoZoners who may have been subject to sexual harassment should notify the store Manager at once or report the situation directly to the AA or the DM. The AutoZoner may also directly contact the Director of Personnel Services or the

> Equal Employment Manager at Mail Station 8029.
>
> Any AutoZoner who receives a complaint or becomes aware of a sexual harassment situation, should report the allegation *immediately.* Management action will be taken to investigate each reported allegation thoroughly in as confidential a manner as possible.

(R. F8, App. at 42-44.)

Petitioner's deposition testimony proves that she was unreasonable in failing to act. Petitioner testified that she never reported the alleged harassment to anyone at or above her immediate supervisor's level in the company, and that she did not take steps to avail herself of corrective and preventative measures at place at AutoZone:

> Q. Did you tell Mr. Noble that you were offended by that [his alleged comments on inventory trips]?
>
> A. No.
>
> Q. Why not?
>
> A. I just wanted it to go away.
>
> Q. And you thought that if you asked him to stop that it would not go away?
>
> A. Correct.
>
> Q. But you never tried to stop it that way, did you?

A. He was my employer.

Q. The question is you never attempted to have him stop by speaking out against it, did you?

A. No.

Q. And you didn't call anybody from that trip higher up in management to report what was going on, did you?

A. No.

Q. Did you tell anybody at the store -- I'm talking about employees at the store now -- that Mr. Noble made you feel upset or uncomfortable?

A. No.

Q. Is there any reason why you didn't speak up?

A. I didn't feel that I could trust any of the other employees to speak to them on that kind of level.

Q. And as you've already told me you didn't see fit to go over Mr. Noble's head in the company hierarchy to complain, true?

A. Correct.

(R. 28, App. at 10, 14.) (Emphasis added.)

Pursuant to the *Ellerth* decision, courts have consistently held that an employee who does nothing to report the alleged harassment has unreasonably failed to take advantage of the employer's opportunities to correct the problem. Hence, the Seventh Circuit's holding in the case sub judice is proper.

Scrivner v. Socorro Independent School District, 169 F.3d 969 (5th Cir. 1999), involved an elementary school teacher who sued the school district and the school principal for sexual harassment and retaliation in violation of Title VII. The school superintendent received an anonymous letter, from someone other than the plaintiff, complaining about the principal's sexually harassing behavior and vulgar comments. The school board immediately launched an investigation. In the context of that investigation the school board questioned the plaintiff about the principal's conduct, but the plaintiff denied the principal's conduct was sexually harassing or vulgar. She did not disclose the principal's inappropriate actions toward her. Four months later; however, the plaintiff filed a formal complaint with the school district regarding the principal's behavior.

The school district promptly investigated the complaint and removed the principal from his position. Nevertheless, the teacher filed her lawsuit. The school district filed a motion for summary judgment on the basis that the plaintiff had unreasonably failed to avail herself of the school district's preventative and corrective sexual harassment policies (the affirmative defense recognized by *Ellerth/Faragher*). The district court granted the motion and the plaintiff appealed. *Scrivner*, 169 F.3d at 971. The Fifth Circuit held that the plaintiff was unreasonable in failing to inform the school district of the principal's conduct when given an express opportunity to do so. For that reason, the employer successfully proved the affirmative defense to Title VII liability for the school principal's harassing behavior.

Even when an employee does complain about sexual harassment, the employer may still be successful in proving the second prong of the *Ellerth/Faragher* affirmative defense. In *Montero v. Agco Corp.*, 192 F.3d 856 (9th Cir. 1999), the plaintiff received several copies of the sexual harassment policy, and knew whom to contact if she believed she was sexually harassed. Despite that fact, the plaintiff waited nearly two years before complaining to the company's human resources department about sexual harassment. Once the plaintiff did complain, the company promptly responded by investigating the plaintiff's complaint and taking disciplinary action against the alleged harassers. Because the plaintiff waited so long to complain, the employer successfully met the second prong of the *Ellerth/Faragher* defense by showing the plaintiff "unreasonably failed to take advantage of the company's preventative and corrective opportunities earlier, although she knew of their existence." *Montero,* 192 F.3d at 863.

Mandy v. Quad/Graphics, Inc., 49 F.Supp.2d 1095 (E.D. Wis. 1999) is another example of an employee's unreasonable failure to take advantage of the employer's preventative and corrective opportunities. In that case, the plaintiff delayed almost two years before reporting a supervisor's sexual harassment. The court noted that had she reported this conduct immediately, or at least sooner, much of the harassment could have been avoided. The plaintiff attempted to explain her delay in reporting the harassment by claiming that she was afraid of retaliation from the supervisor; however, the court rejected that argument, pointing out that the company's anti-harassment policies and procedures would have protected her. The court observed that the Supreme Court placed the burden on the employee to report harassing conduct "before it becomes severe or pervasive,..." *Id.* at p. 1111, quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998). The court held that the

plaintiff's failure to come forward sooner established the company's affirmative defense.

Petitioner has cited no testimony from the record, nor has she explained by way of argument, why her utter silence and inaction should be excused as reasonable. The Supreme Court has held that the second prong of the affirmative defense is established when the employee has unreasonably failed to take advantage of the employer's corrective opportunities. It is difficult to envision a set of facts whereby an employee could have been any more unreasonable than the Petitioner in this case. AutoZone implemented a complaint procedure so that it would have the opportunity to correct such behavior, and this Petitioner failed to report the harassment. This thwarted any opportunity AutoZone would have had to correct such allegedly harassing behavior. There is no reason to remand the case for the District Court to consider whether, as a matter of law, Petitioner's absolute failure to report the alleged harassment could be construed as reasonable.

Petitioner argues that the Supreme Court ruled in *Ellerth/Faragher* that the reasonableness of an employee's failure to report the alleged harassment is a question of fact that necessitates a remand to the district court for determination. Petitioner is incorrect. The Supreme Court did not state that the issue of the Petitioner's reasonableness is a fact issue precluding summary judgment. Rather, the Supreme Court stated that: "[w]hile proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). This statement actually lessens the burden on AutoZone in its proof of the affirmative defense, rather than requiring remand for further

consideration. This pronouncement means that an employer such as AutoZone can prove the employee acted unreasonably even without showing the employee failed to utilize the reporting procedure of its sexual harassment policy. If the employer can prove that the employee unreasonably failed to complain, that should be sufficient to establish the affirmative defense. AutoZone has proven that Petitioner did nothing whatsoever to take advantage of the opportunities it afforded her to correct the alleged harassment, and thus, Petitioner's writ application should be denied.

II. The Supreme Court Applied the New Affirmative Defense in *Faragher* Without Having to Remand, and Thus, the Seventh Circuit in the Instant Case Acted Appropriately in Applying the Defense Rather Than Remanding the Case

Petitioner argues that the Seventh Circuit should not have applied the *Ellerth/Faragher* defense itself, but rather, should have remanded the case so that the District Court could apply the defense. Petitioner reasons that at the time the summary judgment was entered by the District Court, the Supreme Court had not yet established the affirmative defense in *Ellerth/Faragher*, and thus, a remand is necessary. Petitioner's argument is fallacious in two respects.

First, although it is true that the *Ellerth/Faragher* defense had not yet been established at the time the District Court entered summary judgment, the issue of whether or not Petitioner had utilized the complaint procedure was at issue before the District Court. The District Court applied a negligence standard in granting the motion for summary judgment holding that because Petitioner did not complain, AutoZone had no reason to know of the alleged harassment. The Supreme Court later held in *Ellerth/Faragher* that the employer is vicariously liable, without regard to its own

negligence, unless the employer can prove the new affirmative defense. But even though the Supreme Court had not yet decided *Ellerth/Faragher*, Petitioner's failure to utilize the complaint procedure was still at issue for purpose of the negligence issue: whether AutoZone knew or reasonably should have known of the alleged harassment. All questions pertaining to Petitioner's failure to utilize the complaint procedure, indeed her failure to notify anyone in management in any way of the alleged harassment, was fully developed during the discovery stage in the District Court. Remanding the case for further discovery would be pointless, because unless Petitioner is suggesting that she would now change her testimony to defeat the affirmative defense (which she has not said), discovery pertaining to that affirmative defense has already been accomplished.

Second, there is authority in support of the Seventh Circuit's decision to consider the affirmative defense on appeal, rather than remand the case, and Petitioner's argument fails for that additional reason. As the Court of Appeals noted in its decision below, the Supreme Court in *Faragher* applied the new affirmative defense to the facts as previously developed by the parties at the district court stage. The Supreme Court decided the *Faragher* case without remanding for further consideration of the newly established affirmative defense. Considering that the Supreme Court applied this newly established affirmative defense in *Faragher*, which along with the *Ellerth* decision recognized the defense for the first time, then certainly it would be appropriate for the Seventh Circuit to apply the affirmative defense on appeal in this case.

CONCLUSION

AutoZone respectfully requests the Court to deny the Petition for the foregoing reasons.

Dated: December 3, 1999

Respectfully submitted,

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